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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1972

No. 71-1081

LEONARD TONASKET, *Appellant*,

v.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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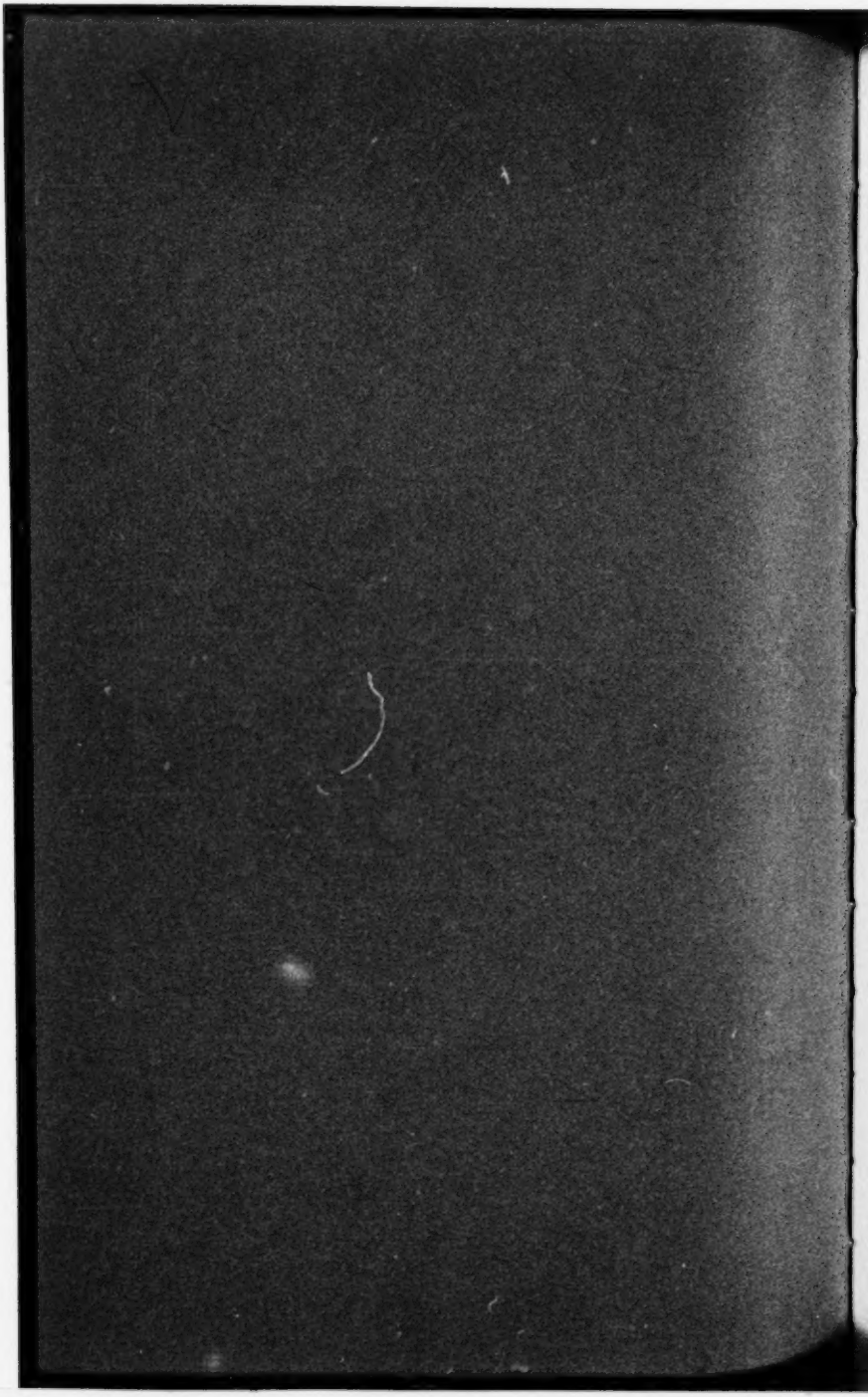

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ARGUMENT

I

Introduction

In this brief, the State will not attempt to respond to every point raised by the United States. Rather, it will address itself to a single issue, an issue of such fundamental importance as to merit, in the opinion of the State, a written reply. And that issue is simply this: Does this litigation pri-

marily concern sales of cigarettes by an Indian to other Indians? Or does it primarily concern sales of cigarettes by an Indian to non-Indians?

On the second question, the United States takes no position, confining itself, on the merits, to the first question. (Br. of United States 17). However, it suggests that, by reason of chapter 157, Laws of 1972, the second question may have become moot.

In contrast, it is the position of the State that the United States has the two questions turned precisely upside down. If any question is moot, it is the first question, i.e., the question of sales by Indians to other Indians. As pointed out in the State's original brief (pp. 7-9), it is this second question which is the critical one. And chapter 157, Laws of 1972, Ex. Sess., in no way makes this critical question moot.

II

The Provisions of the State's Cigarette Tax Act Provide an Exemption for Sales of Cigarettes by an Indian Tribe to Indian Consumers

In chapter 214, Laws of 1969, First Ex. Sess., the legislature amended the provisions of the Washington state cigarette tax (chapter 82.24 RCW) to allow sales by an Indian tribal organization to its own tribal members as consumers. (Chapter 214 is reproduced in full in Appendix A to this brief

as it appears in the session laws in bill drafting form for ease in following the precise statutory changes.)

Section 1 of chapter 214 amended RCW 82.24-.040 so as to provide, so far as is here pertinent, that a wholesaler could sell cigarettes tax-free to the governing body of a recognized Indian tribe; but this permission to make tax-free sales would be revoked by the Department *if sales of such cigarettes were being made to persons who were not enrolled members of the tribe.* Section 2 further implements the policy embodied in section 1. It provides that cigarettes "intended for sale to qualified purchasers may be retained by * * * Indian tribal organizations, without affixing stamps required by this chapter." Who are these "qualified purchasers" to whom the Indian tribal organization may make sales of cigarettes tax free? Obviously, as is clear from section 1, they are tribal members who are purchasing cigarettes for their own consumption. In short, it is the clear policy of the State of Washington, embodied in chapter 214, that sales may be made, tax free, to tribal members so long as sales are not also made, tax free, to nontribal members. Thus, so far as the State is concerned, the fundamental question to which the brief of the United States addresses itself, i.e., sales to Indian consumers, is moot.

In summary: The one question on which the United States, in its brief *amicus curiae*, takes a

position is the very question on which, by reason of chapter 214, the State has no concern. The State has deliberately established a procedure whereby reservation Indians can purchase cigarettes for their own consumption tax-free, and has thereby deliberately decided not to become involved, legally or financially, with this question.

III

The Question of Sales of Cigarettes to Non-Indian Consumers Has Not Been Made Moot by Chapter 157, Laws of 1972, First Ex. Sess.

The State adheres to its position, expressed at page 3 of its original brief, that any issue as to the effect of the Colville Tobacco Ordinance (Appellant's Br. A-23 to A-28), passed on June 23, 1972, and any question as to the effect of chapter 157, Laws of 1972, Ex. Sess. (Appellant's Br. A-34 to A-41) are not properly before the Court. However, because the United States has suggested that the 1972 ordinance of the Colville Tribe and the 1972 act of the Washington state legislature may well have a bearing on the Court's disposition of this case, the State feels compelled to discuss them.

The suggestion of the United States that the Colville ordinance and the 1972 act may have rendered moot the issue of sales of cigarettes to non-Indians—the only issue in which the State is concerned, for the reasons previously discussed—rests upon a fundamental misconception as to the pur-

pose and effect of the 1972 amendatory act. The background of this act, and its basic purpose, are given in the Governor's message explaining his partial veto, reproduced at pp. A-41 to A-43, Appellant's Brief. As indicated therein, the purpose of the legislation was to strengthen the State's hand in collecting the state tax on cigarettes being transported for sale by Indians to non-Indians on those reservations over which the State had not assumed full jurisdiction pursuant to chapter 37.12 RCW. While strengthening the State's hand in enforcement against the seller, the act recognized the fact that enforcement against the purchaser-consumer was often impracticable, and specifically provided in § 7 that if a purchaser acquires cigarettes in an amount not exceeding two cartons, for his own consumption and use, the state would not look to him for payment of the tax. Such provisions exempting the purchaser-consumer of a minimum quantity of cigarettes are not uncommon in state cigarette tax laws. See New York Tax Law, Ch. 60, Art. 20, § 471-a; California Revenue & Taxation Code § 30106; Oregon Rev. Stat., § 323.060.

The 1972 act and these statutory provisions of New York, California and Oregon, are each recognition of a principle of tax administration supported by this Court in use tax collection cases such as *Scripto v. Carson*, 362 U.S. 207 (1960), i.e., the principle that in the field of excise taxes, it is often not feasible to collect the excise tax from the multi-

tude of ultimate consumers, but that the tax must be collected, as a practical matter, from the more limited number of vendors.

Note further that the 1972 amendatory act in no way purports to change the policy established by chapter 214, Laws of 1969, Ex. Sess. Rather, as pointed out in the Governor's veto message, the 1972 act actually builds upon the 1969 act.

Thus, the provision in § 2 of the 1969 act that cigarettes "intended for sale to qualified purchasers may be retained by * * * Indian tribal organizations, without affixing stamps required by this chapter" remains intact. But so, too, does the provision of the 1969 act which limits the term "qualified purchasers" to tribal members who purchase for their own consumption, rather than for resale to non-Indians.

It is apparently the contention of the United States that the phrase "qualified purchasers" has incorporated § 7 of the 1972 act so as to include any person who purchases, for his own consumption, no more than two cartons of cigarettes. But reading this provision of the 1972 act into the concept of "qualified purchasers" as that term is used in § 2 of the 1969 act, is to reverse completely the thrust of the 1972 act. The 1972 act was a tightening, not a loosening, of effective enforcement procedures.[1]

[1]It is an anomaly indeed that the 1972 act, which was vigorously opposed by representatives of those Indian tribes involved in cigarette sales to non-Indians in this state during its passage through the legislature, should now be construed by the United States and by the appellant as having opened wide the door for the very type of tax evasion which it was designed to prevent.

The difficulty with the United States' argument is attempting to interrelate two very different and independent exemptions. The exemption in § 2 is conditioned upon the status of two entities, i.e., the Indian consumer-purchaser on the reservation and the tribal seller. On the other hand, the exemption in § 7 pertains to any person, be he Indian or non-Indian, who acquires or possesses no more than two cartons of cigarettes for his own use, whether he purchases them in Oregon, on an Indian reservation or anywhere else. The § 2 exemption embodies a qualitative test. The § 7 exemption embodies a quantitative test. Each stands completely independent of the other.

The § 2 exemption does three things. It exempts the Indian purchaser irrespective of how many cartons he purchases, the retail transaction and the sellers, i.e., no tax is to be paid by anyone. Section 7, however, merely immunizes the purchaser from any tax liability. It, unlike the § 2 exemption, does not purport to immunize the seller or the transaction from the tax. Each exemption must stand on its own footing. When so construed, there is no basis for the suggestion of the United States that the enactment of § 7 of the 1972 act has a bearing on the question of sales by Indians to non-Indians on a reservation.

Moreover, even if the term "qualified purchasers" as used in § 2 of the 1969 act incorporates § 7 of the 1972 act, an examination of the terms of the 1972 act, in combination with an examina-

tion of the Colville tribal ordinance, shows that the ordinance is still in violation of state law and can hardly be characterized as "apparent cooperation" with state law. (Br. of United States 18) Sections 9, 10 and 11 of the ordinance (Appellant's Br. A-26) make it clear that the tribe acts as a wholesaler, selling to tribal members who act as retailers. Thus, the tribe is not selling to a "qualified purchaser" for it is selling to a retailer who is obviously purchasing for resale and not, in the language of § 7 of the 1972 act, "for purposes other than resale." Further, it is obvious that sales between the tribe and the individual Indian retailers will be in quantities vastly greater than two cartons.

Focusing next on the tax liability of the Indian retailer, as he sells to the non-Indian purchaser, it is clear that he has no tax immunity either. Again, the only tax immunity for Indian sellers is to be found in § 2 of the 1969 act. And this tax immunity extends solely to the Indian tribal organization itself.

In summary: the suggestion of the United States that the 1972 act has somehow rendered moot the question of sales to non-Indians rests upon a double misconstruction of Washington law. The suggestion misconstrues the relationship between the 1969 act and the 1972 act, insofar as it assumes that § 7 of the 1972 act expands the meaning of the term "qualified purchasers" as that term is used

in § 2 of the 1969 act. Further, even if the 1972 act does expand the meaning of the term "qualified purchasers," as used in § 2 of the 1969 act, there is still no statutory exemption conferred by § 2 of the 1969 act upon either the Colville Tribe, now acting as wholesaler, or upon Indian retailers such as the appellant, selling to non-Indian consumers.

CONCLUSION

With regard to the one question which the State considers of critical importance, i.e., the question of sales by Indians to non-Indians, the United States takes no position on the merits, but goes on to suggest that this Court need not reach them by reason of chapter 157, Laws of 1972, Ex. Sess. The State, on the other hand, suggests that a careful reading of chapter 157, together with a careful reading of chapter 214, Laws of 1969, Ex. Sess., and the Colville Tobacco Ordinance, demonstrates that the merits cannot be avoided. The issues remain very much alive.[2]

Respectfully submitted,

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[2]The basic issues remain alive not only with respect to the cigarette tax, but also with respect to the applicability of the retail sales tax, chapter 82.08 RCW. Although the briefs of the various parties and *amici curiae* have discussed primarily, if not exclusively, the question of the validity of the state cigarette tax, this Court's decision on the merits will also affect the validity of the retail sales tax as applied to sales of cigarettes on the Colville Reservation, a subject matter that is in no way connected with either the 1969 act or the 1972 act discussed above.

APPENDIX A

CHAPTER 214

[House Bill No. 362]

TAX ON CIGARETTES

AN ACT Relating to revenue and taxation; amending section 82.24.040, chapter 15, Laws of 1961 and RCW 82.24.040; and amending section 82.24.050, chapter 15, Laws of 1961 and RCW 82.24.050.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 82.24.040, chapter 15, Laws of 1961 and RCW 82.24.040 are each amended to read as follows:

Every wholesaler in this state shall ((immediately)), *within a reasonable time* after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: PROVIDED, That any wholesaler ((engaged-in-interstate-business,)) who furnishes surety bond in ((the)) *a* sum satisfactory to the ((commission)) *department*, shall be permitted to set aside, *without affixing the stamps required by this chapter*, such part of his stock as may be necessary for the conduct of ((such interstate)) *his* business ((without affixing the stamps required by this chapter)) *in making sales to persons in another state or for-*

eign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such ((interstate)) *unstamped* stock shall be kept separate and apart from stamped stock: PROVIDED FURTHER, That every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, *or to a federal instrumentality, or to an Indian tribal organization,* make a true duplicate invoice of the same which shall show full and complete details of the ((interstate)) sale or delivery, *whether or not stamps were affixed thereto,* and shall transmit such true duplicate invoice to the main office of the ((commission)) *department,* at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this ((proviso)) *section* the ((commission)) *department* may revoke the permission granted to the taxpayer to maintain ((an interstate)) *a* stock of goods to which the stamps required by this chapter have not been affixed. *The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place; or have taken place, within the exterior boundaries of the reservation occupied by that tribe.*

Sec. 2. Section 82.24.050, chapter 15, Laws of 1961 and RCW 82.24.050 are each amended to read as follows:

Every retailer shall, ((except as to those articles on which the tax has been paid by the proper affixing of stamps by a wholesaler, as herein provided, affix the stamps for)) *within a reasonable time after receipt of any of the articles taxed herein, cause the same to have* the *requisite* denomination and amount ((necessary)) *of stamps affixed* to represent the tax ((on each individual package or container, the same to be done, in all cases, immediately upon receipt by the retailer of the unstamped articles)) *imposed herein:* PROVIDED, That ((any retailer engaged in interstate business, who furnishes surety bond in a sum satisfactory to the commission, shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business)) *those articles to which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations,* with affixing the stamps required by this chapter. ((Such interstate stock shall be kept separate and apart from stamped stock: PROVIDED FURTHER, That every retailer shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, make a true duplicate invoice of the same which shall show

full and complete details of the interstate sale or delivery, and shall transmit said true duplicate invoice to the main office of the commission, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this proviso the commission may revoke the permission granted to the taxpayer to maintain an interstate stock of goods to which the stamps required by this chapter have not been affixed.))